

**FEB 17 2006****CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT**

PABLO HERNANDEZ,

Petitioner - Appellant,

V.

CHERYL K. PLILER, Warden,

Respondent - Appellee.

No. 04-17131

D.C. No. CV-03-02368-PJH

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Northern District of California  
Phyllis J. Hamilton, District Judge, Presiding

Submitted February 15, 2006<sup>\*\*</sup>  
San Francisco, California

Before: HALL, SILVERMAN, and GRABER, Circuit Judges.

Petitioner Pablo Hernandez appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his California state convictions for numerous sex offenses involving a child under the age of fourteen. We have

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction pursuant to 28 U.S.C. § 2253 and review de novo the district court's denial of the petition. *Fernandez v. Roe*, 286 F.3d 1073, 1076 (9th Cir. 2002).

We affirm because the California Court of Appeal's decision was not objectively unreasonable.

Petitioner argues that the trial court denied him due process of law by excluding the minor's psychiatric and medical records. The California Court of Appeal held that the evidence was properly excluded under California law and that its exclusion did not violate due process. Due process does not require the admission of all relevant evidence and the state may properly exclude relevant evidence pursuant to evidentiary rules. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). To establish a due process violation, Petitioner must show that exclusion of the evidence rendered his trial fundamentally unfair. *Id.* at 42-43.

Petitioner attempted to introduce a doctor's note from a hospital discharge summary that the minor told her mother that she had been repeatedly molested by Petitioner, a brother-in-law, and another cousin-in-law and that a neighbor had attempted to get her drunk to have sex with her. Petitioner argued that the statement that the brother-in-law "repeatedly" molested her was inconsistent with the minor's other statements that only one incident had occurred with the brother-in-law. The statement was properly excluded as it was not inconsistent with other

statements and was not false. The minor never stated that her brother-in-law repeatedly molested her, only that Petitioner repeatedly molested her.

Petitioner sought to introduce the minor's statement that the neighbor attempted to get her drunk and had sex with her. He argued that the statement was a false accusation against another individual. However, the minor conceded that the sex was consensual and the neighbor had admitted that it had occurred. The statement was properly excluded because it was not a false accusation.

Petitioner also sought to introduce the minor's statement that her cousin-in-law had attempted to kiss her and had touched her breast when she was in elementary school. He again argued that the statement was a false accusation. The California Court of Appeal found that the statement was properly excluded pursuant to California Evidence Code § 352 and that its exclusion did not violate due process. The statement was not an accusation initiated by the minor to get the cousin-in-law in trouble, but was a response to questioning by police and medical personnel. Considering the context and nature of the statement, the California Court of Appeal's decision was not objectively unreasonable.

Petitioner argues that the trial court denied him due process by excluding evidence of an alleged affair between the minor's mother and Petitioner. The Court of Appeal's decision was not objectively unreasonable because defense

counsel failed to make an offer of proof that the mother had an affair with Petitioner, and if so, that the minor knew about it.

Petitioner argues that the trial court denied him due process when it failed *sua sponte* to give California Jury Instructions, Criminal No. 2.70. The California Court of Appeal held that any error resulting from the failure to give the instruction was harmless. Habeas relief is available for an incorrect jury instruction only if the “instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Petitioner’s “burden is especially heavy” because he alleges that the trial court merely omitted an instruction, not that it misstated the law. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). The instruction must also have a substantial and injurious effect on the jury verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

The relevant testimony in this case was uncontradicted, Petitioner did not introduce evidence to establish that he did not make the statement, and the trial court gave other instructions regarding the credibility of witnesses. Considering the totality of the instructions given and the evidence at trial, the California Court of Appeal’s holding was not objectively unreasonable.

**AFFIRMED.**